Supreme Court, U.S.
FILED

(1)

NO. 97 1257 JAN 07 1998

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

EARLENE POLYAK — Petitioner

vs

THOMAS HOADLEY AND HOADLEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE HARDWARE — Respondents

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Petition for Writ of Certiorari
To The United States Court of Appeals
And The United States District Court
For The Eleventh Circuit

Petitioner's Brief

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QUESTIONS PRESENTED

I WHETHER THE SUPREME COURT SHOULD ISSUE WRIT TO REVIEW COURT OF APPEALS DISREGARD OF NOTICE OF NON-CONSENT TO MAGISTRATE JURISDICTION

II WHETHER THE SUPREME COURT SHOULD ISSUE WRIT TO REVIEW AFFIRMING OF DISMISSAL BY THE DISTRICT COURT

III WHETHER THE SUPREME COURT SHOULD ISSUE WRIT TO REVIEW CONFLICT IN COURT ORDERED MEDIATION AND CONSTITUTIONAL RIGHTS

CERTIFICATE OF INTERESTED PARTIES

I certify that the following persons are the only parties known to have an interest in the outcome of this case Case No.

1. Respondents and appellees below are: Thomas A Hoadley and Hoadley & Noska pro se counsel for defendant/appellee.

2. Respondent and appellees below are: Lindsley Lumber Company represented by Mitchell Lundeen, and Esther E. Galicia Esq.

3. Petitioner and appellant below are: Earlene Polyak pro se.

4. Respondents and Appellees below are: Lone Star Hardware, Incorporated, Westlake Hardware, represented by J.J. Wicker Trial counsel for Lone Star Hardware, Incorporated, Westlake Hardware, and Shelly H. Leinicke Esq.

5. Respondents and appellees below are: Lone Star Building Centers(Eastern) Inc., (f/k/a Lindsley Lumber Company) represented by Keith, Mack,Lewis, Cohen & Lumpkin and Sara B. Clasby.

Clasby.

6. Magistrate identifications below are: Magistrate Judge Stephen Lynch and transfer of 95-8752CIV-HURLEY from Daniel T. Hurley West Palm Beach to Fedrico A Moreno United States District Judge in Miami on 6th day of January 1996. Judge Moreno handled Case No. 92-8136 CIV-MORENO, and assigned to magistrate Judge Stephen T. Brown.

CORPORATE DISCLOSURE

Westlake Hardware Inc., is a Delaware Corporation with no parents, affiliat or subsidiares.

Lone Star hardware Inc., is no longer a viable entity. In 1989, Westlake Hardware Supply Company merged with Lone Star Hardware Inc., and the Corporation was renamed Westlake Hardware, Inc., and neither ever issued stock to the Public.

It was learned that Westlake Hardware incorporated Lindsley Lumber Company in 1985.

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THOMAS HOADLEY AND HOADLEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE HARDWARE — Respondents

---

Petition for Writ of Certiorari
To The United States Court of Appeals
And The United States District Court
For The Eleventh Circuit

Petitioner prays that a writ of Certiorari issue from this Supreme Court to review the orders of the United States Court of Appeals in affirming the orders of the United States District Court for the Eleventh Circuit pursuant to 28 U.S.C. 2101.[1]

These cases arise out of Circuit Court Case No. CL 89-12618 AC for the Fifteenth Judicial Circuit In and For Palm Beach County, Florida.

OPINIONS BELOW

The opinions of the United States Court of Appeals are set forth in Appendix B, The opinions of the United States District Court are set forth in Appendix A, and any related opinions are set forth in Appendix C.

JURISDICTION

The Order of the United States Court of Appeals affirming the order of the United States District Court was filed on August 14, 1997. An extension of time until and through January 7, 1998 was granted on December 3, 1997, and this petition is timely submitted.

The jurisdiction of the Supreme Court is invoked pursuant to Article III sec. 2,which states that the judicial power shall extend to all cases in law and equity, between state and citizens of another state; and between citizens of different states.

The jurisdiction is further invoked in 28 U.S.C. 2101; 42 U.S.C. 1981,1982 and 1983; Civil Rights Act of 1964, Public Law 102,Fifth

Seventh, and Fourteenth Amendments and other pertinent legislation , and 28 U.S.C.636(c).

The federal and constitutional questions of the abuse of discretion in the denial of due process and the deprivation of civil and constitutional rights and laws are set forth in the brief.

CONSTITUTIONAL PROVISIONS

The pertinent portion of the Fifth Amendment provides as follows:

> No...person...shall be deprived of life liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amen V C1 3&4

The pertinent portion of the Seventh Amendment provides as follows:

> ...where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved.

U.S. Const VII

The pertinent portion of the Fourteenth amendment provides:

> No state shall make or enforce any law which shall abridge the priveliges or immunities of citizens of the United states; Nor shall any state deprive any

person of life, liberty or property without due process of law.
U.S. Const Amen XIV

U.S.C 28 1443: Any of the following commenced in a state court may be removed by the defendant to district court...

(1) Against any person who is denied or cannot enforce in the courts of such state law providing for the equal civil rights of citizens of the United States.

(2) For any act under the color of authority deprived from amy law providing equal rights.

42 U.S.C. Sec 1981:

All persons within the jurisdiction of the United States shall have the same right to sue,...to the full and equal benefit of all laws(amended to "a person").

42 U.S.C. SEc. 1982:

All persons of the United States shall have the same right in every state, to inherit, purchase lease and convey real and personal property.

42 U.S.C. 1983:

Every person, who under the color of any statute, ordinance, regulation, custom of any state...subject or cause to be subjected any citizen of the United States or other person within its jurisdiction and laws shall be liable at law for the parties.

28 U.S.C. 2203:

> In any action ...where the constitu-tion ality of a statute affecting the public interest is drawn into question.

28 U.S.C. 636(c)(1):

> In accordance with prvisions of 28 U.S.C. and Fed. R. P. 73...
> .....
> You should be aware that your decision to consent to referral of your case to a U.S. magistrate for deposition is entirely voluntaryand should be indicated by counsel endorsing the attached consent form(this statement was found in the U.S. District Court and is copied in Appendix A.

STATEMENT OF THE CASE AND FACTS

The Complaint and Jury Trial demand was filed in the United States district Court in West Palm Beach, Florida on December 7, 1995, with the statement that Plaintiff does not consent to magistrate jurisdiction. A copy of the statement with provisions of 28 U.S.C.636 (c) was found in the Clerk's Office. But this case was immediately assigned to Magistrate Judge Lynch on December 8, 1995(App.A.p.2)

The case was transferred from Judge Daniel Hurley in West Palm Beach to Judge Federick A.

Moreno. Petitioner submitted second Notice of Non-consent to Magistrate (App.A.p.

Petitioner moved to set aside previous ruling in 92-8136 CIV-MORENO pursuant to Rule 60.02 FRAUD(whether intrinsic or extrinsic and misrepresentation by adverse party FRcivP, and Reinstated or Reopened case on Complaint and Jury trial Demand,Amended with new evidence of fraud.

New evidence was found that Lone Star Hardware, Incorporated Westlake Hardware and renamed Westlake Hardware incorporated Lindsley Lumber Company in 1985.

Westlake Hardware denied receiving service of summons in 92-8136, but the Court of Appeals disregards proof of service in record and refused to correct record

Westlake Hardware denied responsibility for permnate injury by getting case dismissed in Circuit Court of Palm Beach County No.CL-89-12618 AC .

Lindsley Lumber Company disregarded ser-

vice, but Petitioner sent Florida Department of State Summons and eight (8) dollars and it took service for Lindsley Lumber company pursuant to Chap. 48.19, 48.193, or 48.101 on August 22, 1996

The Magistrate Judge improperly dismissed case against Hoadley & Noska for Breach of contract and Legal Malpractice, which federal court should grant jury trial.

District Court alleged that Lindsley Lumber company answered in misrepresentation by a different corporation in Lone Star Building Centers(a/k/a Lindsley Lumber Company, which it appears is responsible party for maintaining building and renting to Lindlsey Lumber Company.

The Magistrate Judge improperly dismissed 95-8752 and Motion for Reconsideration and the appeal to Court of Appeals to Court of Appeals 96-2743 affirmed this dismissal on August 19, 1997

Case No. 8136 CIV-MORENO was dismissed

by Magistrate Judge Brown's Report and Recommendation that Petitioner did not serve Westlake Hardware Rule 4(j)

Petitioner submitted a Notice of Non-consent to Magistrate Jurisdiction 28 U.S.C. 636(c)(1)

But the United States District Judge did not respond pursuant to 28 U.S.C. 636(2) and Magistrate Judge carried caseadverse to the Petitioner

This appeal 93-4390 CIV-MORENO affirmed the District Courts order.

The above cases arise out of the Breach of contract and Legal Malpractice in denial of jury trial under opposition to mediation under Florida Rules of Civil Procedure 1.700(c), and the contribution of Lone Star Hardware, Incorporated, Westlake Hardware, and Lindsley Lumber Company during CL-12618 AC in the Fifteenth Judicial Circuit in Palm Beach County.

Thomas Hoadley and Hoadley & Noska took

case and signed contract for contingency fee printed on front of Statement of Clients Rights under state statutes.

The Case involves Petitioner's permanent injury in which she fell in dirty water under leaking air-conditioner behind a shelf as she left Lindsley Lumber Company store following and employee with patio umbrella. She went into the air and came down on her head wrists with right leg receiving worst injury.

After this permnate injury, she received physical therapy in December 1985, and again in 1996, and back vertebra came out. She was in wheelchair and on walker for one(1) year,and has had physicial therapy every year including 1997. She cannot be operated on as danger to heart patient.

The insurance company did not even pay for X-rays after permanent injury.

Petitioner contends Thomas Hoadley and Hoadley & Noska promised a jury trial butbreach of contract in Statement of Clients Rights

Thomas Hoadley and Hoadley & Noska sued Lindsley Lumber Company, Lone Star Hardware, Incorporated, Westlake Hardware for damages in excess of five thousand dollars.

On December 16, 1985 Lindsley Lumber Company and Lone Star Hardware, Incorporated, Westlake Hardware had a duty to properly maintain its premises in a reasonably safe condition for the customary use to which it may be put by its invitees or patrons and to guard against subjecting them to hazardous and dangerous conditions.

Defendants negligently and carelessly failed to keep their aisle area in a reasonably safe condition by virture of their failure to keepit dry and free of liquid substance and by their failure to warn Petitioner and others of this hazardous condition. Defendants knew or should have known about hazardous condition and cleaned floor.

And as a direct and proximate result of the negligance of Lindsley Lumber Company, Lone

Star Hardware, Incorporated, Westlake Hardware Petitioner was injured in and about her body, and extremities; suffered pain,incurred medical expenses in the treatment of injures, sufferred physical handicap, stress and inconvience, permanent injury, and the loss of every day pleasures of life.

Thomas Hoadley subjected Petitioner to a deposition with attorneys for Lone Star Hardware and Westlake Hardware, prior to the knowledge that Westlake Hardware had incorporated Lindsley Lumber Company.

Thomas Hoadley and Hoadley & Noska did not fulfill contract with Petitioner for a jury trial, and agreed for Court Ordered Mediation at a cost of one hundred sixty-five dollars($165.00) per hour without Petitioner's agreement and against her own free will.

Petitioner's appeal to Florida Supreme Court for review was dismissed and and "No Motion for Rehearing will be entertained by the Court No. 79,534(91-0999)(App.C p.

Case 92-8136 was assigned to Magistrate Judge, but Petitioner submitted Notice of Non-consent 28 U.S.C.(c)(1) within ten (10) days, but the District Court did not respond pursuant to Rule 636(c)(2), and magistrate Judge continued with Report and Recommendation to dismiss case. The District Court dismissed 92-8136 without prejudice. This case was submitted within one year of the dismissal of appeal 93-4390.

The appeal to the dismissal of 95-8753 CIV-MORENO with prejudice in the District Court is affirmed in 96-4723, and Petitioner petitions for a writ to review this appeal, and motion to set aside 95-8753 and 92-8136 for constitutional right to jury trial for relief in damages in the District Court.

Erie Railroad v Thompkin requires federal court to give some equitable remedies in diversity case,the only qualification is that federal court have power to grant relief. Erie Railroad v Thompkin,Moores K.F. 8716.5 M 661.

1. THE SUPREME COURT SHOULD ISSUE WRIT TO REVIEW COURT OF APPEALS DISREGARD OF NOTICE OF NON-CONSENT AFFIRMING MAGISTRATE JURISDICTION

Petitioner filed Notice of Non-consent to Magistrate jurisdiction pursuant to 28 U.S.C. 636(c) and Fed. R.P. 73 on December 7, 1995 in 95-8752 CIV-HURLEY,but case was assigned to Magistrate on December 8, 1995.

On the same day a notice was found in the Clerk's office stating

> You should be aware that your decision to consent to the referral of your case to a U.S. Magistrate for disposition is entirely voluntary and should be indicated by counsel endorsing the attached consent form...

Petitioner does not have any knowledge or expertise in the legal profession, but believed that the Courts were created for the relief of the people.

This Complaint and Jury Trial Demand to set aside 92-8136 CIV-MORENO by Magistrate pursuant to Rule 60.02 FRAUD(whether intrinsic or extrinsic) and misrepresentation by adverse party Federal Rules of Civil Procedure.

2. THE SUPREME COURT SHOULD ISSUE WRIT TO REVIEW AFFIRMING OF DISMISSAL WITH PREJUDICE ON RES JUDICATA

The Court of Appeals dissmissed case with prejudice alleging res judicata as claim preclusion barring claims fully which could have been raised at prior proceeding Citibank NA v Data Base Financial Corp., 904 F 2d 1490 1501 (11th Cir). And alleges that res judicata bars a lawsuit when four elements present (1)There must be a final judgment, (2)There must be a Court of competent jurisdiction,(3) parties or those in privey with them must be identical in both cases, and (4) must involve the same cause of action.ID at 1501 T.A. Durham Inc., v Jefferson National Bank, 793 2d 1541 154 (11th Cir.1986).

In response to (1) the Supreme court has ruled that only final order res judicata, but case has not been to Supreme Court.

> The Supreme Court has stated "it is familiar law" that only final judgment is res judicata. G & S Merriman Co. v. Saafield. 241 US 22 28 36 S Ct 277 60 L Ed 858(1916).

(2) The decision was rendered by a Magistrate Judge in Report and Recommendation after Petitioner timely and properly submitted notice of Non-consent to magistrate jurisdiction pursuant to 28 U.S.C. 636(c)(1).

(3) The parties or those in privy with them are not identical in both law suits as Sara B. clasby of Keith,Mack, Lewis, Cohen & Lumpkin answered for Lone Star Building Center (Eastern (f/k/a Lindsley Lumber Company) which owned building when Lindsley Lumber Company rented, and it appears liable, but a different corporation.

(3) The same cause of action is not involved as Complaint and Jury Trial Demand as it is Amended to include new evidence of Westlake Hardware withholding incorporating Lindsley Lumber company in 1985.

Rule 60.02 FRcivP allows to set aside 92-8136 and Rule 26 Exceptions in Res Judicata and Collateral Estopel allows for relief.

(4) the judgment in the first action was plainly inconsistent with a fair and

equitable implementation of a statutory and constitutional scheme.

(e) For reasons of substantive policy in cases involving a CONTINUING WRONG the Plaintiff is given the right to sue from time to time.

The Court of Appeals disregards the matter of fact that Westlake Hardware failed in its legal duty to protect the rights of the injured party in permanent injury

> ... it is well settled that liabilities of a selling company is not imposed upon successor company unless(3) The successor is a mere continuation of the predesscor or (4) The transaction is a fradulent transaction is a effort to avoid liabilities of the predesscor. Bernard v Key Manufacturing Company,409 So 1947 (Fla 1982).

Westlake Hardware is a mere continuation of the predessor.

3. THE SUPREME COURT SHOULD ISSUE WRIT TO REVIEW CONFLICT IN COURT ORDERED MEDIATION AND CONSTITUTIONAL RIGHTS

The Supreme Court should issue writ to review the conflict b etween Court Ordered Mediation and constitutional rights of due process in jury trial and state statutes regarding contingency fees and Statement of

Clients Rights where the constitutionality of statute of that State affecting Public interests are drawn into question pursuant to 28 U.S.C. 2403.

In initial case against Lindsley Lumber Company, Lone Star Hardware, Incorporated, Westlake Hardware, and as was later revealed incorporated Lindsley Lumber Company too Circuit Court No. 89-12618 AC, Thomas Hoadley signed contract on back of Statement of Client Rights and in complaint to Court promised a jury Trial.

In fact, Mr. Hoadley notified Petitioner in letter of jury trial date April 8, 1991.

But Mr. Hoadley without Petitioner's agreement a greed with Defendants and allowed Mediation procedures costing one hundred sixty-five ($165.00) dollars per hour.

Petitioner did not know anything about Court mediation or agree to procedure.

When Mr. Hoadley conspired with Defendant and went to hearing without notifying her

until after meeting held.

When Petitioner tried to support her constitutional right to a jury trial, Mr. Hoadley withdrew representation in Court,and case was dismissed in favor of defendants.

Petitioner tried to get to carry case to find another attorney, and submitted many motions. She did submit interrogatories within ten (10) days and Court Order on February 29, 1991.

Thomas Hoadley and Hoadley & Noska failed in their fiduciary duty in Breach of Contract in State Client Rights on back of contract signed within statute.

> This is a material breach of contract: Violation of contract which is substantial and significiant and which usually excuses the agrieved party from further performance under contract and affords right to sue. Black's Law Dictionary. (1991 Sixth Edition).

Defendants brought the same invasion of constitutional right of jury trial to the United States District Court in a deposition in Court with out her presence March 21,1991.

Hoadley violates Florida Rules of Civil Procedure 7.100(c) and Contract Under Statment of Coients Rights provided by the state for contingency fees. Hoadley misrepresented his intergty as his wife coming from small town in Michigan near Petitioner's home. He stated that he did trials and had another case against Lindsley Lumber Company when ladder fell and injured party. (1) Lawyer may not withdraw, but Hoadley submitted withdrawl to Court.(2) Hoadley referred case to Noska with out notification to Petitioner,(3) Hoadley withdrew, but never returned papers,(4) You have the right to make the final decision, but Hoadley made decisions, and contacted Doctor to misrepresent petitioner's permanent injury from which she suffers to day.

TheCourt of Appeals affirms District Court without considering well pleaded facts adverse to pro se litigant rights in Diversity of Citizenship protection of constitutional right to due process of jury trial.

Petitioner brought case to District Court to enforce providing for constitutional rights of due process and jury trial for relief in damages for permanent injury and for equal rights as provided in 28 U.S.C. 1443(1)(2).

The Court of Appeals affirms the District Court's alleged legal standard of review of pro se litigant's Complaint and Demand for jury trial ror relief in damages for unlawful invasion of right to trial in state Courts.

A court will not grant a motion to dismiss unless the plaintiff fails to prove any facts that would entitle the plaintiff to relief. Conley v Gibson, 355 U.S. 41, 45-46 (1957). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well pleaded facts as true.Scheur v Rhodes, 416 U.S. 232 1974); St Joseph's Hospital Corp.,of America 795 F. 2d 948 (11th Cir. 1986).

CONCLUSION

Petitioner prays that this Supreme Court issue a writ of mandamus to review the Court of Appeals affirming of the District Court order dismissing this case with prejudice,and review the State Court of Florida's conflict in Court Ordered Mediation and Contingency fees for constitutionality affecting Public interest drawn into question.

Petitioner prays that this Supreme Court reviews and returns this case back the the District Court for the constitutional right of a jury trial for damages as set forth in the Complaint and Demand for a Jury Trial for relief in damages.

On the 6th day of January, 1998.

Respectfully submitted,

Earlene Polyak
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(313) 676-3364
presently-
145 Lakeside Drive
Jupiter, Florida 33458
(561) 743-9544

CERTIFICATE OF SERVICE

I certify that a true copy of this pleading has been mailed to Thomas Hcadley pro se Hcadley & Noska, 320 Fern STreet, West Palm Beach , Florida 33401(561) 833-1677; Georg Hartz Lundeen, Flagg & Fulner, Esther H. Galicia attorneys for Lindsley Lumber Company,4800 LeJeune Coral Gables, Florida 33146(305) 862-4800;Wicker Smith,Tutan, O'Hara, Grahm & Lane, Shelly Leincke One E. Broward Blvd,5th Flocr Barnett Bank Plaza, Ft. Lauderdale, Florida 33301(305) 467-6405 and Keith,Mack, Lewis, Cohen & Lumpkin, Sara Clasby, First Financial Center, 20thFloor, 200 S. Biscayne Blvd., Miami, Florida 33131 on the 6th day of january, 1997.

_____
Earlene Polyak

I certify that the above information is true and correct to the best of my knowledge and belief

_____
Earlene Polyak

STATE OF FLORIDA
COUNTY OF PALM BEACH

_____ _____
NOTARY PUBLIC My comn' expires;_____

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NOTICE OF OPPORTUNITY TO CONSENT TO EXERCISE OF CIVIL JURISDICTION BY MAGISTRATE AND APPEAL RIGHT

In accordance with provisions of 28 U.S.C. 636(c) and Fed. R. P. 73. you are hereby notified that all United States magistrate Judges of this district court, in addition to their duties, may, upon consent of all parties in a civil case, conduct any or all proceeding in the case, including a jury trial, and order the entry of a final judgment.

You should be aware that your decision to consent, to the referral of your case to a U.S magistrate for disposition is entirely voluntary and should be indicated by counsel endorsing the attached consent form for the plaintiff(s) and defendants(s). If the form is executed by all counsel for the parties, it should communicated solely to the clerk of the district court.ONLY if all parties to the case consent to the reference to the magistrate judge will either the judge or magistrate judge to whom the case has been assigned be

informed of your decision.

Your opportunity to have your case disposed of by a magistrate judge is subject to the calen dar requirements of the court. Accordingly, the district judge to whom your case is assigned must approve the reference of the case to a magistrate judge for disposition.

In accordance with 28 U.S.C. 636(c)(3) and Fed. R. Civ.P. 73(c), an appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge in accordance with 28 U.S.C. 636 (c)(4) and Fed. R. Civ. P. 73(d). Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this circuit only by petition for leave to appeal. Copies of consent form Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 95-8752-CIV-MORENO

EARLENE POLYAK
Plaintiff

v

FILED MAR 26 1996

THOMAS HOADLEY AND HOADLEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE HARDWARE
Defendants

_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant Thomas Hoadley and Hoadley & Noska's Motion to Dismiss the Complaint(docket no 12) filed on January 23, 1996, and Defendants' Lone Star Hardware, Inc. and Westlake Hardware Motion to Dismiss (docket no.11) filed January 30, 1996.

THE COURT has considered the motions, the responses, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the Motions to Dismiss are granted with prejudice.

LEGAL STANDARD

A court will not grant a motion to dismiss unless the plaintiff fails to prove any facts that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41 45-46(1957) When ruling on a motion to dismiss, a court view the complaint in the light most favorable to the plaintiff and accept theplaintiff's well pleaded facts as true. Scheuer v Rohdes, 416 U.S 232 (1774); St Joseph's Hospital, Inc. v. Hospital Corp. of America, 795 F. 2d 948(11th Cir. 1986).

FACTUAL BACKGROUND

Plaintiff's original claim arises from an incident occuring on December 16, 1985, when Plaintiff allegedly slipped and fell in a puddle on the premises of Lindslye Lumber Company. On December 11, 1989, Plaintiff filed a complaint in the Florida Circuit Court of the 15th Judicial Circuit against Lone Star Hardware, Inc., Westlake Hardware and Lindsley Lumber Company. The court granted summary judgment on behalf of Lone Star Hardware and

Westlake Hardware,finding that they did not own the premises at t he time of Plaintiff's accident, and had assumed no liability for claim arising prior ro their purchase of Lindsley Lumber company in 1987(sic 1985).

Plaintiff then filed an amended complaint against the same three defendants,but the Court subsequently issued another order dismissing Lone Star and Westlake on July 27, 1990. Plaintiff's remaining claim against Lindsley Lumber Company was dismissed with prejudice on by the Court on March 11, 1991. Plaintiff appealed this dismissal to the Fourth District Court of Appeals of the State of Florida on April 5, 1991, but her"Motion for Leave to Petition for Rehearing was denied on March 27, 1992. Plaintiff's petition for review to the Florida Supreme Court was likewise denied.

In March of 1992, Plaintiff filed a claim in the United states District Court for the Southern District of Florida, in case no. 92-8136-CIV-MORENO, against the same three

Defendants who were previously dismissed from her state court claim. Additionally, Plaintiff added a claim of negligence against Thomas Hoadley and Hoadley & Noska, the attorneys who represented in state court. The several Defendants filed motions to dismiss, which were referred to United States Magistrate Judge Brown for a report and recommendation.Plaintiff failed to respond to any of the motions to dismiss,therefore, Magistrate Judge Brown recommended that the Court Grant motions to dis missthe case as to all defendants. Thes Court adopted Magistrate's Report and Recommendation and issued an order of Dismissal as to all Defendants on March 31, 1993.

Plaintiff apqpealed her case to the Court Appeals for the Eleventh Circuit in case no. 93 -4390. The Eleventh Circuit affirmed this Court judgment on August 14, 1995, finding that Appeallant had failed to state a claim for relief. Thereafter. Plaintiff filed the present action based on allegedly new evidence, which

she claims was revealed during her appeal.

LEGAL ANALYSIS

I. Thomas Hoadley and Hoadley & Noska's Motion Motion to Dismiss

Defendants move to dismiss Plaintiff's complaint based on res judicata,claiming that this exact same case was filed by Plaintiff in 92-8136 CIV-MORENO and subsquently dismissed.An appeal was taken to the Eleventh Circuit, where there was a review and final adjudication of all issues.Futhermore, Defendants argue that Plaintiff's complaint fails to meet any of the essential requirement of federal pleading, and that she is barred by the applicable statute of limitations.

The doctrine of resjudicata, or claim preclusion, bars the subsquent filing of claims which were raised or could have been raised in prior proceeding, Citibank N.A.v Data Lease Financial Corp., 904 F.2d 1490, 1501 (11th Cir. 1990). Res judicata bars a subsequent lawsuit when four elements are present:(1) there must be a final judgment on merits, (2) the decision

must be rendered by a Court of competent jurisdiction, (3) the parties, or those in privy with them must be identical in bothcases, and (4) the same cause of action must be identical in both cases." Id. at 1501, quoting I.A. Durbin Inc., v Jefferson Nat'l Bank, 793 F. 2d 1541, 1549 (11th Cir. 1986).

As to the first element,the dismissal of plaintiff's prior claim against Defendants Thomas Hoadley and Hoadley & Noska without prejudice for Plaintiff's failure to respond to the motion to dismiss is considered an adjudication upon merit merits pursuant to Federal Rule of civil Procedure 41(b). as to the second element, there is no dispute that Court's Order of Dismissal was entered by a court of competent jurisdiction. Thirdly, the parties are identical to the present action;and lastly,the same coause of action is involved in both cases Plaintiff's claims against Defendants Thomas Hoadley and Hoadley & Noska were raised or could have been raised in the earlier

proceeding, as they arise out of the same set of facts as those underlying her 1992 complaint.

Accordingly, this Court finds the Plaintiff's claims are barred by principles of res judicata. The Court need not address the other affirmative defenses asserted by Defendants in their motion to dismiss.

II. Defendants Lone Star Hardware, Inc., and Westlake Hardware's Motion to Dismiss

Defendants Lone Star Hardware, Inc. and Westlake Hardware move to dismiss based on res judicata. Furthermore, Defendants argue that Plaintiff has failed to allege a cause of action against them under state or federal law, and that she is barred by applicable state of limitations.

Addressing Defendants' res judicata defense the Court finds that Defendants have satisfied the four part analysis set forth in Part I of this opinion. Therefore, the Court finds that Plaintiff's claims against Lone Star Hardware, Inc., and Westlake Hardware are also barred

by the principles pf res judicata 1

CONCLUSION

For the reasons stated above, it is

ADJUGED that Defendants Thomas Hoadley and Hoadley & Noska's motion to dismiss is FRANTED. Plaintiff's claims against these Defendants are dismissed with prejudice, Further it is,

ADJUDGED that Defendants Lone Star Hardware, INc., and Westlake Hardware's motion to dismiss is GRANTED. The claims against the Defendants are also dismissed with prejudice.[2]

DONE AND ORDERED in Chambers at Miami, Florida this 22nd day of March 1966.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:
Earlene Polyak pro se
4063 Hood Road
Plam Beach Gardens, florida 33410
3179 Middlefield Drive
Trenton, Michigan 48183
Thomas Hoadley Esq.
George Hartz, Esq.
Shelly Leinicke Esq.
Karina Haycook Esq.
Sara Clasby Esq.

[1]Although the Court need not reach the other affirmative defenses asserted in the motion, the Court notes that the Plaintiff fails to state a cause of action against Lone Star Hardware, Inc. and Westlake Hardware. Moreover, any cause of action against these Defendants arising from her accident occurring in December 1985 is barred by the applicable statute of limitations. See Fla.Stat. 95.11(3) (1993).

[2]The Court notes that the only Defendant remaining in this action id Lindsley Lumber Company, which filed an answer to the complaint under the name "Lone Star Building Centers (Eastern), Inc.,(f/k/a Lindsley Lumber Company) on February 9, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EARLENE POLYAK

Plaintiff

v

THOMAS HOADLEY AND HOADLEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE HARDWARE

Defendants

Case No. 95-8752

FILED APR 30 1996

ORDER DISMISSING LINDSLEY LUMBER COMPANY,FINAL ORDER OF DISMISSAL, AND ORDER DENYING ALL PENDING MOTIONS AS MOOT

This MATTER is before the Court upon a sua sponte review ot the record.

THE COURT notes that on March 26, 1996, this Court issued an Order dismissing Defendant Thomas Hoadley, Hoadley & Noska, Lone Star Hardware Inc. and Westlake hardware from this action based on the principles of res judicata Lindsley Lumber company is the only remaining defendant in this action. Therefore, on March 26, 1996, this Court issued and Order to Show Cause, requiring Plaintiff to file a response with the Court no later than April 12, 1996 to

show cause why this case should not also be dismissed as to Defendant Lindsley Lumber Company based on res judicata. The Court indicated that if Plaintiff failed to file such a response, this action would be dismissed without further order of the Court.

THE RECORD reflects that on April 11, 1996 Plaintiff filed a Motion for Leave for Reconsideration and Oral Argument on Order granting Defendant's Motion to Dismiss, and Motion for Extension to Respond to Order to Show Cause (docket no. 21), which was denied by this Court Order issued April 30, 1996.

The Court notes that contrary to Plaintiff allegations that Lindsley Lumber Company did not answer the Complaint and should be default Lindsley Lumber Company filed an answer to the Complaint under the name" Lone Star Building Centers (Eastern) Inc." (f/k/a Lindsley lumber Company) on February 9, 1996(See Plaintiff's Motion for leave for Reconsideration,(docket no 21), filed on April 11, 1996).

THE COURT has considered the pertinent portions of the record and is otherwise advised in the premises it is

ADJUDGED that this action is DISMISSED

from this action based on the principles of res judicata, as set forth in this Court's Order grantingDefendants'Motion to Dismiss,issued March 26, 1996, and adopted herin. Accordingly it is

ADJUDGED that this action is dismissed with prejudice. It is also

ADJUDGED that all pending motions in this case ard DENIED as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of April, 1996.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 95-8752-CIV-MORENO

EARLENE POLYAK

Plaintiff,

APR 30,1996

v

THOMAS HOADLEY AND HOADLEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE HARDWARE

Defendants

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDER ATION AND ORAL ARGUMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR EXTENSION OF TIME

THIS CAUSE came before the Court upon Plaintiff's Motion for Leave for Reconsider-ation and Oral Argument on Order Granting Defendant's Motion to Dismiss and Order to Show Cause, and Motion for Extension of Time ,filed on April 12, 1996 (D.E.21).

The Court has considered the motion, and and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that Plaintiff's Motion for Reconsider ation and Oral Argument is DENIED, it is

ADJUDGED that Plaintiff's Motion for Extemsion of Time to respond to this Court's Order to show cause is DENIED.

DONE AND ORDERED in the Chambers at Miami, Florida this 30th of April 1996.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EARLENE POLYAK
Plaintiff, CASE NO 95-8752-CIV-HURLEY
V
FILED JAN 04 1995
THOMAS A. HIADLEY &
HOADLEY NOSKA, LINDSLEY
LUMBER CO., LONE STAR HARDWARE
INC., WESTLAKE HARDWARE
Defendants /

ORDER OF TRANSFER

Pursuant to Local Rule 3.9(A),it is hereby

ORDERED AND ADJUDED that this case is transferred to the Honorable Federico A Moreno,Judg to whom the original case was assigned, for all proceedings.

DATED in Chambers at West Palm Beach, Florida this 2nd day of Jan, 1995.

Daniel T.K. Hurley
UNITED STATES DISTRICT JUDGE

After reviewing the file the undersigned hereby aceepts the transfer of this case,There fore it is

ORDERED AND ADJUDGED that all pleadings shall hereafter bear case nimber 95-8752-CIV-MORENO, indicating the Judge to whose calendar the case is now assigned.

DATED IN Niami, Florida this 4th day JAN

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EARLENE POLYAK
Plaintiff

JURY TRIAL DEMAND
95-8752 CIV-HURLEY

v

FILED DEC 7 1995

THOMAS HOADLEY AND HOADLEY &
NOSKA, LINDSLEY LUMBER COMPANY,
LONE STAR HARDWARE, INCORPORATED,
WESTLAKE HARDWARE
Defendants

PLAINTIFF DOES NOT CONSENT TO U.S.MAGISTRATE

Plaintiff does not consent to U.S. Magistrate jurisdiction pursuant to 28 U.S.C. 636(c)(1).

This denial of consent is timely submitted with complaint and jury trial demand.

On the 6th day of December, 1995

Respectfully submitted,

Earlene Polyak
3179 Middlefield Drive
Trenton, Michigan 48183
presently
145 Lakeside Drive
Jupiter, Florida 33458
(407) 743-9544

CERTIFICATE OF SERVICE

I certify that a true copy of this pleading has been mailed to Thomas Hoadley and

Noska, 320 Fern Street, West Palm Beach,Florida 33410,Esther Galicia Esq. 4800 LeJune Road Coral Gables, Florida 33146, and Shelly H. Leinicke Esq., One East Broward Blvd. 5th Floor Barnett Bank Plaza, Fort Lauderdale. Florida 33301.

Signed
Earlene Polyak

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EARLENE POLYAK
Plaintiff

FILED JAN 8, 1995

v

Case No. 95-8752

THOMAS HOADLEY AND HOADLEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE HARDWARE
Defendanta

NOTICE
PLAINTIFF DOES NOT CONSENT TO U.S. MAGISTRATE

Plaintiff gives notice that Plaintiff does not consent to Magistrate jurisdiction pursuant to 28 U.S.C. 636(1).

1. This denial of consent was timely submitted with complaint and jury trial demand filed on December 7, 1995.

2. Notice that this case was filed with one hundred twenty dolllars in U.S, District Court, Clematis Street, West Palm Beach, Fla. 33401.

3. The summons were issued from U.S. District Court 95-8725-CIV-Hurley.

I certify that a true copy of this notice of non-consent to Magistrate jurisdiction was

mailed to Thomas Hoadley, 230 Fern St. West Plam Beach, Florida 33401,George Hartz et al,, 4800Le Jeune Road, Coral Gables, Florida 33146, Shelly Leinche Esq., One East Broward Blvd.5th Floor,Barnett Plaza,Ft Lauderdale, Florida 14460 on the 8th day of January, 1996.

Respectfully submitted,

Earlene Polyak
145 Lakeside Drive
Jupiter, Florida 33458
(561) 743-9544

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 95-8752-CIV-MORENO

EARLENE POLYAK
Plaintiff

FILED MAR 26 1996

v

THOMAS HOADLEY AND HOADLEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE HARDWARE
Defendants

_____/

ORDER TO SHOW CAUSE

This cause came before the Court upon sua sponte examination of the record.

THE COURT has considered the pertinent portions of the record and it appears that Defendant Lindsley Company should be dismissed from the case based on the principles of res judicata,as set forth in this Court's order granting Thomas Hoadley and Hoadley & Noska's Motion to Dismiss, and granting Lone Star Hardware, Inc. and Westlake Hardware's Motions to Dismiss issued on March 26, 1996. Lindsley Lumber Company is the only remaining Defendant in this action. Therefore, it is

ADJUDGED that Plaintiff file a response

with the Court no later than April 12, 1996, to show cause why this case should not be dismissed without further order of the Court.

DONE AND ORDERED in Chambers at Miami, Florida this 26th day of March, 1996.

Signed
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4723
Non-Argument Calendar
D.C. Docket No. 95-8752-CIV-MORENO

FILED AUG 19,1997

EARLENE POLYAK Plaintiff-Appellant

versus

THOMAS HOADLEY AND HOADLEY & NOSKA: LINDSLEY LUMBER COMPANY;LONE STAR HARDWARE, INCORPORATED; WESTLAKE HARDWARE

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Florida

Before HATCHET, Chief Judge, EDMONSON and COX

PER CURIAM:

Earlene Polyak appeals the district court dismissal with prejudice of her civil action.

Playak's complaint fails to state a federal claim upon which relief may be granted The state law claims asserted are barred by the applicable statutes of limitation. Under these circumstances we need not address other bases for affirmance advanced by the defendants.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.93-4390
Non-Argument Calendar

D.C. Docket No. 92-8136-CV-FAM
FILED AUG 14 1995

EARLENE POLYAK Plaintiff-Appellant

versus

THOMAS HOADLEY Respondent-Appellee
AND HOADLEY & NOSKA,
LINDSLEY LUMBER COMPANY,
LONE STAR HARDWARE,INCORPORATED
WESTLAKE HARDWARE

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT,Chief Judge, BIRCH and BLACK,

Circuit Judges.

PER CURIAM:

We affirm the judgment of the District court.Appellant failed to state a claim for relief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF VLORIDA
Case No. 92-8136-CIV-MORENO

EARLENE POLYAK
Plaintiff

FILED MAR 31 1993

v

THOMAS HOADLEY, HOALEY & NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, AND WESTLAKE HARDWARE
Defendants

ORDER DISMISSING CASE PURSUANT TO MAGISTRATE REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon the Objection and Demand for Oral Argument.

THE MATTER was referred to Honorable Stephen T. Brown, United States Magistrate Judge.A Report and Recommendation dated March 22, 1993 haS BEEN FILED, recommending that the above-styled cause be dismissed as to all Defendants. The Court has made de novo review of issues presented by the objections to the Magistrate's Report and Recommendation, and being otherwise fully advised in the premises it is

ADJUDGED that United States Magristrate Judge Brown's Report and Recommendation in its

entirety, and based theron,Plaintiff's motion in opposition is overruled and denied, Consequently it is further

ADJUDGED that this cause is hereby dismissed without prejudice, with each partv bearing its own fees and costs. Fed R. Civ P. 41(a)(1)(ii).Further any pending motions are moot.

Signed
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-8136 CIV MORENO

EARLENE POLYAK
Plaintiff

FILED MAY 10 1994

vs

THOMAS A. HOADLEY AND HOADLEY AND NOSKA, LINDSLEY LUMBER COMPANY, LONE STAR HARDWARE, INCORPORATED, WESTLAKE,HARDWARE
Defendants

_____/

REPORT AND RECOMMENDATION

This matter is before the Court on Motion to Dismiss by Defendants Thomas A. Hoadley and Hoadley & Noska on June 9 1992 and Lindsley Lumber Company and Roni Sehayik M.D., filed June 22, 1992 and July 6, 1992 respectively.

CASE

Plaintiff failed to respond to aforementioned motions to dismiss within the time limits provided by our local rules. Notwithstanding that fact, on August 17,1992 this Court entered an order giving the plaintiff through and including September 3, 1992, to respond to said motions. That order(incorporated herin by reference) stated pertinent

part that failure to respond will result a recommendation that these claims be dismissed.

Also on August 17, 1992 this court ossued an order to show cause. It appeared to this court that service of process had not been affected as to Lone Star hardware, Inc. and Westlake Hardware within 120 days as required by Rule 4(j) of the Federal Rules of Civil Procedure.Plaintiff was given through and including September 3, 1992 to show good cause why service of process had not been accomplished as to these defendants. Again, that order indicated that failure to comply would result in a recommendation for dismissal.

On September 1, 1992 the plaintiff filed an"Answer to show cause and application for extension of time. She indicated that she had a burden because of being out of state and undergoing physical therapy treatments. She indicated in her answer that did serve defendants Lone Star Hardware Inc., and Westlake Hardware but would check have to check

her records on her return to Florida.

As a result of Plaintiff's Answer to Show cause this court entered another order on September 21, 1992 (incorporated herin by reference). That order gave the plaintiff an additional 60 days to respond to the pending motions aND TO SHOW THE court that service had been accomplished on the aforementioned defendants. That order again reiterated that a recommendation for dismissal would follow failure to comply. The plaintiff had failed to comply with that order.

> The only evidence in the file of service on defendant Westlake Hardware Inc., is its combined notice of appearance dated November 9, 1992 reflecting service on October 20, 1992.

DISCUSSION

Rule 41(b0 of the Federal Rules of Civil Procedure gives the court jurisdiction to enter an involuntary dismissal for the failur of the plaintiff to prosecute or complay with these rules or any order of the court. It appears clear to this court as to the motions

to dismiss dealt with earlier along with issue of service of process on Defendants Westlake Hardware and Lone Star Hardware Inc., the plaintiff has failed to prosecute the case and failed to comply with several orders of this court, even with giving the plaintiff extension of time and due consideration for her pro se status.

DISCUSSION -RULE 4(j)

Rule 4(j) of the Federal Rules of Procedure provides that a dismissal is mandatory unless service is made on a defendant within 120 days after the complaint is filed unless goos cause can be shown. Dismissal is mandatory unless the cause, and the time limit in the rule is strictly applied. See Geiger v Allen, 850 F. 2d 330(7th Cir.1988);Lovelace v Acme Markets, Inc., 820 F. 2d 81(3rd. Cir.1987) Since there is no evidence in this record that defendants Lone Star Hardware Inc., and Westlake Hardware were served within 120 days of filing of complaint, the court must look to

good cause shown. by the plaintiff. There is none. Courts have held that inadventure or mistake does not constitute good cause. See e.g.McDonald v United States,898 F. 2d 466(5th Cir. 1990); Leonard v Stuart-James Co. Inc., 742 F.Supp 653 (N.D. Ga. 1990). Additionally inadvertent failure to serve does not constitute good cause. See Geiger(supra).

This court is not unmindful of the pro se status,but that does not preclude compliance with Rule 4 (j). See e.g. Kirsh vDeozier 851 F.2d 1509 (5th Cir.1988).

It is therefore appearing to this court despite several opportunities given plaintiff that no good cause has been shown as to why Rule 4(J) of the Federal Rules of Procedure has not been complied with, the case against defendants Lone Star hardware,Inc., and Westlake Hardware should be dismissed,without prejudice.

DISCUSSION-MOTIONS TO DISMISS

As previously noted, the plaintiff has

failed to respond to Motion to dismiss of defendants Thomas A. Hoadley, Hoadley & Noska Lindsley Lumber Company, and Roni Sehayik M.D. filed June and July 1992. Therefore the complaint as to those defendants should be dismissed without prejudice.

There are subsequently pending motions motions to dismiss filed by Lone Star Hardware, Inc., and Westlake Hardware(November 24, 1992,Lindsley Lumber Company(December 21, 1992) supplemental grounds for a motion to dismiss filed by defendants Thomas Hoadley and Hoadley & Noska dated December 7, and 8th, 1992.The recommendations herein make is necessary consider theose motions.However, in an abundance of caution they will be addressed as well.

DISCUSSION-SUBQUENT MOTIONS TO DISMISS

Defendants Lone Star Hardware Inc., and Westlake Hardware filed a motion to dismiss on November 24, 1992.Defendant Westlake filed a motion to dismiss in response to service of process against it allegedly accomplished on October 20, 1992. Since this court previously ruled the plaintiff had failed to comply with Rule 4(j) of the Federal Rules of Civil Procedure, a later compliance does not operate

to relieve the plaintiff from themandatory nature of the rule. therefore, this court's recommendation to dismiss as to defendant Westlake Hardware does not change their subsquent motion to dismiss.

As to defendant Lone Star Hardware, Inc., the file remains devoid of any evidence on this defendant. Plaintiff remains in non-compliance with court's earlier orders to show that service of process was accomplished prior to August 17, 1992.While this Court cannot determine from the record , it appears that the motion to dismiss as to defendant Lone Star Hardware inc., was likewise a response to late service of process. There is no reason, for this court to change its recommendation as to these defendants.

The plaintiff filed a motion to dismiss Defendant's Motion to Dismiss on December 4, 1992directed to the motion to dismiss filed by Lone Star Hardware,Inc. and Westlake Hardware.Much mention is made herein of

defendants Hoadley and the law firm Hoadley & Noska.This resulted in supplemental materials filed by those defendants on December 7th,8th. While the plaintiff did respond to supplemental grounds, as of the date of this report and Rec ommendation, the plaintiff has still not responded to the original motion to dismiss of the defendants,and still has not complied with Court orderspreviously mentioned.

Finally, on December 21, 1992 defendant Lindsley Lumber Company filed another motion to dismiss based , in pertinent part, on failure of the plaintiff to comply with this court prior order. Plaintiff did not respond to that motion until February 26, 1993(in violation of local rules of procedure).however, that response fails to address any of the issues in the motion to dismiss and fails to address plaintif non-compliance with earlier orders of the court or with Rule 4(j) of the Federal Rules of civil procedure.

RCOMMENDATION

It is therefore respectfully recommended that this courtenter an order dismissing this case as to all defendants, without prejudice.

The parties have 10 days from this Report and Recommendation within which to serve and objections, with the Honorable Federico A. Moreno, United States district Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual finding contained herein. LaConte v Dugger,847 F 2d 745(11th Cir 1988) cert denied 488 U.S. 958, 109 S. Ct 397(1988).

DONE AND ORDERED this 22nd day of March 1993 Miami, Florida .

Signed
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Federico A Moreno
Mitchell Lundeen Esq,
Earlene Polyak pro se
Thomas Hoadley Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 92-8136 CIV-MORENO

JURY TRIAL DEMAND

EARLENE POLYAK
Plaintiff

v

FILED MAR 19 1992

THOMAS HOADLEY AND HOADLEY
AND NOSKA, LINDSLEY LUMBER COMPANY
LONE STAR HARDWARE, INCORPORATED,
WESTLAKE HARDWARE
Defendants

PLAINTIFF DOES NOT CONSENT TO U.S.MAGISTRATE

Plaintiff does not consent to U.S. Magistrate conducting any proceedings in this nor the entry of any judgment in this action pursuant to 28 U.S.C. 636(c)(1) Federal Rules of Civil Procedure.

Plaintiff does not consent to Magistrate and expects that any and all appeals shall be to the United States Court of Appeals for the Eleventh Circuit.

Plaintiff does not consent to Magistrate jurisdiction and demands that this action be referred to a U.S. Judge. This denial is timely within ten(10) days of reference on March13, 1992.

On the 17th day of March, 1992.

Respectfully submitted,

Earlene Polyak
4063 Hood road
Palm Beach Gardes, Fla.
(407)

Certificate of Service

I certify that a true copy of this plead- has been mailed to Thomas Hoadley, 320 Fern St. West Palm Beach, Florida 33401,Mr. Lundeen 4800 LeJeune Road, Coral Gables, Florida 3446, Shelly Leiinicke Esq.,P.O. One East Broward Blvd. 5th Floor, Barnette Bank Plaza, Fort Lauderdale, Florida 33301.

Earlene Polyak

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

App. 40

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO. CL 89-12618 AC

EARLENE POLYAK
Plaintiff
vs

LINDSLEY LUMBER COMPANY
Defendant
_____/

ORDER

THIS CAUSE come before this honorable Court on Defendant's Motion for Sanction, Defendant's Motion to Compel Attendance at IME (Court ordered mediation),Plaintiff's Motion to Withdraw as Counsel and Motion for Continuance and both plaintiff and counsel for Plaintiff and counsel for the Defendant appear ing personally, the Court finds the following:

1. That the Defendant served to the Plaintiff a set of interrogatories totalling thirty(30) and Plaintiff failed to respond to said Interrogatories.

2. That on January 8, 1991, Circuit Judge Edward Fine ordered Mediation requiring the

appearance of counsel and clients as mandatory

3. On February 13, 1991, Defendant filed a motion to compel Answers to Interrogatories

4. On February 19, 1991, a hearing was held before this Honorable Court on Defendant Motion to Compel dated February 13, 1991, Defendant's Motion to Excuse Representatives from Mediation and Defendant's Motion to Strike Notice of Disclosure of Expert Witness.

5. That on February 19,1991 this court ordered that Plaintiff personally appear at the mediation scheduled for February 20,1991, as previously ordered on January 8, 1991.

6. That on February 8, 1991, this court granted Defendant's Motion to Compel and order that the Defendant have ten(10)days from February 19, 1991, whithin which to answer Interogatories.

7. That despite this Court's order dated February 19, 1991 the Plaintiff failed to personally appear at the scheduled mediation. Thatthe Plaintiff had notice notice of said

mediation as evidenced by her letter directly to the Court objecting to attendance to mediation attendance at the mediation dated February 1, 1991.

8.Upon questioning by this Court,Earlene Polyak indicating that she had employed Plaintiff's counsel Thomas Hoadley Esquire, for the express purpose of a jury trial and would not participate in anything other than a jury trial. When asked directly by this Court whether she would attend mediation as ordered by this court,she stated she would refuse to attend mediation and would only attend a jury trial,despite orders of this Court.

9. That despite this Court's order dated February 26, 1991, Plaintiff in direct correspondance with Defendant's counsel stated "I object to the Interrogatories in that they cannot be used as evidence in most states and "I believe that they are just a witch hunt."

10.That despite this Court's order on dated February 19, 1991 the Plaintiff failed

to answer the Interrogatories within the ordered frame.

11. On February 22, 1991, defense counsel renoticed the taking of deposition of Earlene Polyak, Plaintiff, and her husband, Alex Polyak, for March 4, 1991, at 2:30 p.m. and 3:00 p.m. Plaintiff's counsel advised Defendant's counsel that Plaintiff and her husband had notice on March 4. 1991 depositions in a telephone conversation between Plaintiff's counsel and Defendant's counsel.

12. That on March 4, 1991, EArlene Polyak and Alex Polyak failed to appear for their scheduled depositions as evidenced by the certificates of Non-appearance filed by Eileen M. Civin of Klein-Bury and Associates, Inc. 501 South Narcissus AVenue, West Palm Beach, Florida 33401.

13. That Plaintiff Earlene Polyak has wilfully, blantely and deliberately disregarded this Court's authority and orders by failing to comply with discovery, direct orders of

this Court referring to discovery, and failing to attend Court-ordered mediation as well as depositions set in accordance with the Rules of Civil Procedure.

It is therefore ORDERED AND ADJUDGED:

That the claim of Earlene Polyak v Lindsley Lumber Company is hereby dismissed with prejudice for Plaintiff's willful,blatant deliberate and wanton disregard for this Court's previous orders, failure to participate in discovery and the failure to personally attend Court ordered mediation as set out before.

DONE AND ORDERED in Chambers at West Plam Beach, Palm Beach County, Florida on this 11 day of March , 1991.

Signed James T. Carlisle
CIRCUIT COURT JUDGE

Copies furnished to:
Thomas A. Hoadley, Esq.
Keith J. Lambdin Esq.